

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SPARACINO PLLC,
1920 L Street, N.W., Suite 535
Washington, D.C. 20036,

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES,
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201,

Defendant.

Case No.: _____

COMPLAINT FOR VIOLATION OF THE FREEDOM OF INFORMATION ACT

INTRODUCTION

1. Plaintiff Sparacino PLLC represents hundreds of U.S. citizens who were injured, or whose relatives were killed or injured, by terrorist attacks in Iraq, including American military veterans and Gold Star families. Plaintiff brings this action for relief under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to compel the U.S. Department of Health and Human Services (the “Department”) to produce records related to the Iraqi Ministry of Health (the “Ministry”) and corrupt payments made to that Ministry, which helped fund the terrorist attacks that injured Plaintiff’s clients.

2. Plaintiff properly submitted four targeted requests for Department records pursuant to FOIA and applicable Department regulation, which are supported by documentation from a prior FOIA production that strongly suggests the Department has the requested records.

3. The Department’s statutory deadline for making a determination concerning each request has expired, but the Department has neither produced any documents nor made a determination as to any of these four requests. The Department’s failure to act on Plaintiff’s requests violates FOIA.

4. Plaintiff has constructively exhausted administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and now seeks judicial relief compelling the Department to promptly search for and produce the requested records, and enjoining any further improper withholding.

JURISDICTION AND VENUE

5. This Court has jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201(a), and 2202.

6. Venue lies in this District under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

PARTIES

7. Plaintiff Sparacino PLLC is a law firm with an office in Washington, D.C. Plaintiff submitted each of the FOIA requests identified in this Complaint.

8. Defendant U.S. Department of Health and Human Services is an “agency” of the federal government within the meaning of 5 U.S.C. § 552(f)(1). The Department is believed to have possession, custody, and control of records responsive to Plaintiff’s requests.

FACTUAL ALLEGATIONS

I. Background

9. Plaintiff and its undersigned co-counsel represent more than 1,200 U.S. citizens who were killed or injured, or whose relatives were killed or injured, by the Shiite terrorist group Jaysh al-Mahdi in Iraq between 2005 and 2011. These victims of heinous terrorist attacks have asserted claims in this District against large medical-supply companies that helped finance Jaysh al-Mahdi’s terrorist acts by, among other things, making corrupt payments to obtain contracts from the Jaysh al-Mahdi-controlled Ministry. *See* Second Am. Compl., *Atchley v. AstraZeneca UK Ltd.*, No. 17-cv-02136-RJL (D.D.C. Feb. 4, 2019), ECF No. 106.

10. In response to a prior FOIA request (No. 2018-00446-FOIA-OS) seeking information relevant to *Atchley*, the Department produced certain records to Plaintiff. Those records refer to and strongly suggest the existence of additional relevant records, including documents analyzing corruption at the Ministry; corruption within the Ministry’s import subsidiary, Kimadia; and connections between the Ministry and Jaysh al-Mahdi. Based on the

Department's previous production, Plaintiff submitted four targeted requests for these additional records and now brings this suit to compel prompt productions in response to each request.¹

11. The requested records also have broader public significance beyond the *Atchley* litigation. National media has reported on the *Atchley* plaintiffs – many of whom are Gold Star families and wounded military veterans, and all of whom made great sacrifices for our country – reflecting the public's interest in terrorist financing in Iraq.² Further reflecting the public importance of records related to these allegations, the Department of Justice (the "DOJ") is reportedly investigating the corrupt dealings alleged by the *Atchley* plaintiffs,³ as the *Atchley* defendants have publicly acknowledged.⁴

¹ Plaintiff is separately pursuing an administrative appeal challenging the Department's excessive and unexplained withholdings from the prior production. That appeal is not at issue here.

² See, e.g., Gardiner Harris, *Lawsuit Claims Three U.S. Companies Funded Terror in Iraq*, N.Y. Times (Oct. 17, 2017); Kyle Swenson, *Lawsuit: Big Pharma Funded Terrorism in Iraq with Payments to Corrupt Health Ministry*, Wash. Post (Oct. 19, 2017).

³ See, e.g., Gardiner Harris, *Justice Dept. Investigating Claims that Drug Companies Funded Terrorism in Iraq*, N.Y. Times (July 31, 2018).

⁴ Three of the five named corporate-family defendants, AstraZeneca, Johnson & Johnson, and Pfizer, disclosed the DOJ investigation in their SEC filings. See AstraZeneca PLC, Report of Foreign Issuer (Form 6-K) at 58 (July 26, 2018) (stating that it "received an inquiry from the US Department of Justice in connection with an anti-corruption investigation relating to activities in Iraq, including interactions with the Iraqi government and certain of the same matters alleged in the [*Atchley*] Lawsuit"); Johnson & Johnson, Quarterly Report (Form 10-Q) at 40-41 (Aug. 2, 2018) ("Also, the company has received an inquiry from the United States Department of Justice regarding the matters set out in the [*Atchley*] complaint."); Pfizer Inc., Quarterly Report (Form 10-Q) at 44 (Aug. 9, 2018) (stating that, "[i]n July 2018, the U.S. Department of Justice requested documents related to [the *Atchley*] matter, which we will be providing"; and noting "government investigations related to contracts with the Iraqi Ministry of Health"). Another defendant, Roche, confirmed to the press that it "received an inquiry from and is cooperating with the Department of Justice on this matter." Angus Liu, *Roche, Johnson & Johnson Pulled into Justice Department Probe of Alleged Terrorist Bribes*, FiercePharma (Aug. 2, 2018), <https://www.fiercepharma.com/pharma/roche-johnson-johnson-also-under-justice-department-probe-alleged-terrorist-bribes>.

II. Plaintiff Properly Submitted Four FOIA Requests, and Each Was Perfected

12. Between February 5 and February 20, 2019, Plaintiff properly submitted four separate requests for records via the Department’s online portal. *See* 5 U.S.C. § 552(a)(3)(A); 45 C.F.R. § 5.23 (“You also may submit your request electronically . . . by submitting it to the Department’s web portal[.]”). As discussed more fully below, the requests reasonably describe the requested records and provide all information required by Department regulations to perfect the requests. *See* 45 C.F.R. §§ 5.22(b)-(d), 5.24(b)(1)(ii)-(iii).

13. On the same day each request was submitted, the Department emailed an acknowledgment assigning a tracking number to the request as detailed in the table below, indicating that the request had been received by the appropriate office within the Department. *See* 45 C.F.R. § 5.24(a) (“The acknowledgement . . . email inform[ing] you of your request tracking number” is sent “after receipt by the appropriate office.”). The subject line of each acknowledgment stated, “Status Update for Request #2019-00[xxx]-FOIA-OS,” and the body of each stated, “[t]he status of your FOIA request #2019-00[xxx]-FOIA-OS has been updated to the following status ‘Received’”. To log into the HHS FOIA Submission Site click on the Application URL below. <https://requests.publiclink.hhs.gov/palMain.aspx>.” No additional information was provided to or requested from Plaintiff in these initial acknowledgments. Accordingly, the FOIA requests were “perfected” on the date the Department acknowledged they were received. *See* 45 C.F.R. § 5.24(b)(1)(iii).

Request Date	Tracking Number	“Received” Date
2/5/2019	2019-00540-FOIA-OS	2/5/2019
2/5/2019	2019-00546-FOIA-OS	2/5/2019
2/6/2019	2019-00551-FOIA-OS	2/6/2019
2/20/2019	2019-00620-FOIA-OS	2/20/2019

14. As discussed in the following four paragraphs, each request reasonably described the records requested and, to the extent possible, specified subjects, documents, authors, dates, and corroborating information establishing the existence of the requested records, including by referencing records the Department itself previously produced. *See* 45 C.F.R. § 5.22(a). In providing extensive detail concerning the requested records, Plaintiff hoped to minimize any burden on the Department and streamline production of responsive documents.

15. *Request 2019-00540-FOIA-OS* seeks documents related to a 2008 project in which the Department worked to curtail corruption within Kimadia. The project is often called the “Kimadia Reform Project.” This request seeks the following records from January 1, 2007 through December 31, 2011: (1) “all records, proposals, studies, and ‘deliverables’ . . . related to the Kimadia Reform Project;” and (2) “all . . . email messages and other communications, [including] meeting minutes and notes[] related to the Kimadia Reform Project.” As explained in the request, a prior Department FOIA production included documents describing the Kimadia Reform Project, including documents identifying deliverables and reports that were to be generated as part of the project and referencing the project’s “findings and recommendations.”

16. *Request 2019-00546-FOIA-OS* seeks, from July 1, 2004 through December 31, 2009, “all memoranda, notes, emails, telegrams, cables, reports or other communications” from, or on behalf of, the Department’s Health Attaché “concerning the Iraqi Ministry of Health” or its personnel. The Department’s Health Attaché worked with the U.S. Embassy in Baghdad, under the auspices of the Embassy’s Iraqi Reconstruction Management Office (“IRMO”), and served as a consultant for U.S. policy concerning the Ministry. In that capacity, the Health Attaché’s Office generated many documents relevant to *Atchley*. Plaintiff included with its request an example of one such document: a memorandum drafted by the Health Attaché providing a

“Ministry Overview” that was part of the Department’s prior FOIA production. By describing the Health Attaché’s work concerning the Ministry, the document further confirms that the Department should have additional records prepared by the Health Attaché’s office concerning the Ministry. The request specifies two such records and identifies them by date, title, author, and recipient(s).

17. *Request 2019-00551-FOIA-OS* seeks two memoranda, identified by date, title, author, and recipient. It also seeks all records from July 1, 2005 through December 31, 2009, concerning the Ministry that were generated by the Health Attaché’s Office in response to a separate memorandum from the Ambassador that is identified by date, title, and author, including two sets of records specified by title.

18. *Request 2019-00620-FOIA-OS* seeks a set of specific records documenting particular relevant projects undertaken by the Health Attaché’s Office and IRMO. The Department’s prior production confirms the existence of all of these requested records. Specifically, the request seeks, from June 1, 2004 through December 31, 2011:

- (1) all “Health Attaché Weekly Updates,” one of which was included in the Department’s prior FOIA production;
- (2) all “Iraqi Ministry Measures of Effectiveness” or “Ministry Assessments” of the Ministry generated by the Health Attaché’s Office;
- (3) all “Weekly Essential Services Reports” generated by the Health Attaché’s Office;
- (4) all minutes, agendas, and handouts or distributions related to meetings of the “Health Sector Working Group,” one of which was included in the Department’s prior FOIA production;
- (5) all records “related to [a] July 9, 2005 meeting(s) between IRMO and Emma Harriet Nicholson,” a meeting which was referred to in the Department’s prior FOIA production;
- (6) all records “related to [a] May 26, 2005 conference call between U.S. Government Accountability Office [] personnel and IRMO personnel regarding health care in Iraq”; and

(7) the “Medical Supply Lists” and other attachments to the Ministry symposium outlines dated from February 2007 through March 2007, which were produced as part of the Department’s prior FOIA production.

19. Consistent with the detailed nature of the requests, the Department has never asserted that any of these requests failed reasonably to describe the records sought or was improper or deficient in any manner. Nor has the Department ever requested any additional information from Plaintiff. Instead, the Department has failed to respond substantively at all to Plaintiff’s requests.⁵

III. The Department Failed to Make Determinations within FOIA’s Time Limits, and Plaintiff Has Constructively Exhausted Administrative Remedies

20. As described above, by February 20, 2019, each request had been properly submitted with the required information, and the Department had acknowledged receipt, thereby perfecting the requests, such that “the 20 working day statutory response time beg[an] to run.” 45 C.F.R. § 5.24(b)(1)(i)-(iii); *see also* 5 U.S.C. § 552(a)(6)(A)(i) (requiring a determination within 20 working days of receipt of a FOIA request).

21. The Department’s automated email replies did not assert that unusual circumstances existed, as required to toll the 20 working day statutory response period under FOIA, and with respect to two of the requests the Department has never made such an assertion

⁵ The Department has not responded to two of the four requests since sending an automated email the day the requests were received, and the status of these requests on the Department’s FOIA status website states only “received.” On March 26, 2019, Plaintiff was notified that the status for Request 2019-00540-FOIA-OS changed to “[a]ssigned for processing,” and on April 15, 2019, Plaintiff was notified that the status for Request 2019-00546-FOIA-OS changed to “[i]n process.” On the same dates, Plaintiff also received acknowledgment letters for these two requests stating that the Department has “initiated a search” and indicating that Department staff would follow up if the request involved “a voluminous amount of records.” The Department has not followed up on either request.

or communicated with Plaintiff about any potential need for an extension.⁶ Nor has the Department requested that Plaintiff modify or narrow any request or offered Plaintiff an opportunity to do so. *See* 5 C.F.R. § 5.24(f).

22. The Department’s statutory deadline for making a determination as to the last of the requests at issue was March 20, 2019. (Counting February 21, 2019 as the first day of the period, March 20, 2019 was the twentieth and last working day on which the Department could have made a timely determination.) Yet, as of the date of this Complaint, in violation of FOIA, the Department has neither produced any documents in response to nor made a determination concerning any of the four requests at issue.

23. Indeed, for two of Plaintiff’s four requests, the status has not changed, and the Department has not communicated with Plaintiff since the day the requests were submitted. For the other two requests, though the Department said it “initiated a search” (in the case of Request 2019-00540-FOIA-OS, more than three weeks ago), it never provided an estimated date of completion and has been silent since.

⁶ The Department’s March 26 and April 15, 2019 acknowledgments for Requests 2019-00540-FOIA-OS and 2019-00546-FOIA-OS assert that unusual and exceptional circumstances will impact the Department’s response time, and further declare that, if such circumstances “prevent[] our office from responding within the 20 working day timeframe, we will utilize a 10 working day extension to process your request, as permitted pursuant to FOIA.” But the Department is not entitled to a ten working day extension under FOIA, because it failed to comply with 5 U.S.C. § 552(a)(6)(B). Specifically, § 552(a)(6)(B)(i) allows an extension only if the Department provides “written notice . . . setting forth the unusual circumstances . . . *and* the date on which a determination is expected to be dispatched” (emphasis added). The Department’s notices were not only untimely – they are dated after the time to make a determination had already expired – but also failed to specify a date on which determinations are expected. Moreover, the Department never indicated that the requests in fact capture voluminous records or offered Plaintiff an opportunity to narrow or modify its request to expedite processing. In any event, the Department has exceeded a ten working-day extension even if it were entitled to one.

24. The Department's failure to comply with FOIA's deadline for making a determination constructively exhausts Plaintiff's administrative remedies and authorizes Plaintiff to bring suit in this District to compel prompt production and enjoin continued wrongful withholding of records responsive to Plaintiff's requests. *See* 5 U.S.C. § 552(a)(6)(C)(i).

CLAIMS FOR RELIEF

Count I: Failure to Comply with FOIA

25. Plaintiff repeats and re-alleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

26. Plaintiff properly made four requests for records within the possession, custody, and control of the Department.

27. The Department is an agency subject to FOIA.

28. The Department was required under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for records responsive to Plaintiff's FOIA requests.

29. The time limit under 5 U.S.C. § 552(a)(6) for the Department to conduct such a search and to make a determination as to each of Plaintiff's four FOIA requests has expired.

30. The Department has wrongfully failed to communicate to Plaintiff a determination as to each of Plaintiff's four FOIA requests.

31. Pursuant to 5 U.S.C. § 552(a)(3)(A), the Department was required to produce promptly all responsive records that are subject to disclosure under FOIA.

32. The Department has wrongfully failed to make such a production for any of Plaintiff's four FOIA requests.

33. Plaintiff has exhausted administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

34. The Court should therefore order the Department to promptly produce all responsive records, subject to withholdings agreed to by the parties or approved by the Court.

35. To facilitate determination of the validity of any withholdings based on FOIA exemptions the Department might ultimately assert, Plaintiff seeks an order compelling the Department to produce indexes justifying redactions to or withholding of responsive records.

Count II: Declaration Precluding Assessment of Fees

36. Plaintiff repeats and re-alleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

37. The Department has failed to comply with time limits under 5 U.S.C. § 552(a)(6).

38. The Department did not provide timely written notice to Plaintiff of any unusual circumstances.

39. The Department has not discussed or attempted to discuss with Plaintiff how or whether Plaintiff could limit the scope of any of Plaintiff's four FOIA requests.

40. No court has determined that exceptional circumstances exist.

41. Accordingly, Plaintiff is entitled to a declaration that the agency may not assess any search fees associated with any of Plaintiff's four FOIA requests, pursuant to 5 U.S.C. § 552(a)(4)(A)(viii).

PRAYER FOR RELIEF

Plaintiff respectfully requests that the Court:

- a. Order the Department to promptly conduct a reasonable search for all records responsive to Plaintiff's four FOIA requests, to the extent such a search has not already been conducted, and to demonstrate that it employed search methods reasonably likely to lead to the discovery of responsive records;

- b. Order the Department to produce within 20 days or such other time as the Court deems proper all records responsive to Plaintiff's four FOIA requests that are subject to disclosure under FOIA, as agreed to by the parties or determined by the Court, and indexes justifying any withholdings or redactions;
- c. Declare that the Department failed to comply with the time limits under 5 U.S.C. § 552(a)(6) and that search fees therefore may not be assessed under § 552(a)(4)(A)(viii) with respect to any of Plaintiff's four FOIA requests;
- d. Award Plaintiff attorney's fees and costs incurred in relation to this case, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- e. Grant Plaintiff any other relief the Court deems just and proper.

Dated: April 23, 2019

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Respectfully submitted,

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